The Central Law Journal.

ST. LOUIS, JANUARY 27, 1882.

CURRENT TOPICS.

A Georgia newspaper, *The Telegraph and Messenger*, of Macon, comments very bitterly upon the recent action of the Supreme Court of that State with reference to the appointment of a reporter. After mentioning the fact of an increasing practice as the cause of the former incumbent's withdrawal, it says: "His resignation followed, was accepted, and before his chair had time to cool, a young gentleman, a relative and for years a partner, and a connection of the chief justice, was installed in his place. * * * * The offices created by law are for the benefit of all the people, and not for a privileged few, and while a party caucus may see fit to raise one to a position to the requirements of which he is unequal, a court of judges could find no worse precedent to follow. The haste in which this thing was done can not be supported by any plea of necessity. Captain Jackson must have known before the Christmas vacation of the court what course his growing practice rendered necessary. He should have communicated it to the court, and the court in turn should have seen to it that the bar and the public were duly notified. The claims of every lawyer in the State who was qualified to fill the vacancy, and who aspired to it, should have been as calmly and impartially considered as a case involving human life or the stability of fundamental law. The people of the State will falter, and justly falter, in their respect for and support of a court which makes nepotism rather than service, experience and ability the qualifications for the patronage at its disposal." We know nothing whatever about the merits of the controversy. The appointment in this instance may have been most just and fit. But the general principle here contended for is sound and salutary. We mention the matter because we believe the evil is a growing one. It has come to be a thing of not infrequent occurrence, that judges indulge in the vicious practice of regarding the power of appointment, which is sometimes vested in them, as what the politicians euphoniously term "patronage," as, in short, a personal perquisite rather than a public trust. The tendency of such a custom is not only to saddle the public with incompetent service, but it degrades the judiciary and brings it nearer to the level of machine politics. No professional eminence—and eminent judges have been known to be guilty of this sort of nepotism—can altogether atone for,or palliate the gross impropriety of the custom.

Our attention has been called to a verbal inaccuracy in one of the current topics of last week's issue, wherein we spoke of an article by W. B. Martindale, on the "Nature and Effect of a Quit-Claim Deed," (12 Cent. L. J. 127) as taking the position that the form of the deed gives notice of the existence of prior rights in others. We should have said that the position is taken, and, as we think, it is conclusively shown, that the only semblance of principle upon which these cases can be made to rest is, that the form of the deed gives notice of prior rights in others. In the article referred to, it is contended that a purchaser by quit-claim is not *per se* chargeable with notice, either of equities or an unrecorded deed. The case of Chapman v. Sims (53 Miss. 154) is to the same effect.

The Albany Law Journal, in its issue of the 21st inst., comments approvingly upon a suggestion for the establishment of a uniform system of digesting and indexing; but, we think, falls into error in attributing the credit for it to Mr. Field. In 13 Cent. L. J. 281, our issue of the 14th of last October, we made the first suggestion of the kind which we have ever seen in print. We are, however, really gratified by the double compliment of our esteemed contemporary's approval of our plan, and of having our modest efforts attributed to so able and progressive a mind as Mr. Field's. As for the plan we there suggested for giving such a scheme the necessary prestige and weight by securing for it the indorsement of a convention of reporters, authors and legal editors, (which our contemporary refers to) it is unquestion-

ably true that the *dictum* of such a body would have sufficient weight with the profession to insure the adoption of any plan to which it should give its approval. The practical difficulty, however, lies in the procurement of a really representative convention of reporters, etc. The resultant good will accrue rather to the profession at large than to themselves, and the desire of becoming public benefactors, or the gratification of the pride of calling, in the excellence of the work performed, will hardly form a sufficiently practical foundation for such an undertaking. The National Bar Association, if it were to give the subject some attention, and put the work of selecting and arranging a desirable system into the hands of a competent committee, might do a great deal towards effecting what seems to us to be a really desirable purpose.

THE ACTION OF MALICIOUS PROSECUTION—PROBABLE CAUSE.

I.

The general issue being pleaded in an action of malicious prosecution, the burden of proving these five facts is cast upon the plaintiff: (1) The fact of the prosecution; (2) that the defendant was the prosecutor, or instigator; (3) that the prosecution terminated in the plaintiff's favor; (4) that the charge was made without reasonable or probable cause; (5) that the defendant in making it was actuated by malice. No great difficulty can arise in proving the first three, while the fifth may be presumed in many cases where direct proof is impossible. But the fourth requisite — the absence of probable cause — has given rise to much discussion, and generally presents in practice a variety of questions, as troublesome to solve as they are vital to the action itself.

§ 1. *What is Probable Cause?*—What, in the first place, is the legal defiintion of probable cause? In Broad v. Ham,[1] Tindal, C. J., said; "There must be a reasonable cause, such as would operate on the mind of a discreet man; there must be a probable cause, such as would operate on the mind of a discreet man." In Bacon v. Towne,[2] Shaw, C. J., said: "There must be such a state of facts as would lead a man of ordinary caution and prudence to believe and entertain an honest and strong suspicion that the person is guilty." The best definition of probable cause to be found in the reports is generally considered to be the one given by Mr. Justice Washington in Munn v. Dupont:[3] "A reasonable ground of suspicion, supported by circumstances apparently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense of which he is charged." Each of these has been approved and followed in many subsequent cases.[4] But the first of these definitions is obviously tautological, while the two last are too narrow. "Reasonable" and "probable" are now considered, so far as this action is concerned, as synonymous; and the latter adjective standing alone is sufficient to express the meaning. Chief Justice Tindal was more rhetorical than precise. The language of Chief Justice Shaw and Mr. Justice Washington appears to assume that an offense and guilt are essential to the charge for which the complaint is made, and it can not be made to include the malicious prosecution of a purely civil action. Therefore although, being a recent decision, it lacks the indorsement which the language above has received, I prefer the definition given by Perkins, J., in Lacy v. Mitchell:[5] "That apparent state of facts found to exist upon reasonable inquiry, that is, such inquiry as the given case rendered convenient and proper, which would induce a reasonably intelligent and prudent man to believe the accused person had committed, in a criminal case, the crime charged, and in a civil case that a cause of action existed."

§ 2. *Honest Belief Alone no Defense.*—In Chandler v. McPherson,[6] Collier, C. J., said: "It may be safely affirmed, as a general rule,

[1] 5 Bing. (N. C.) 722.

[2] 4 Cush. 217.

[3] 3 Wash. C. C. 31.

[4] See Boyd v. Cross, 35 Md. 197 (1870); Stansberry v. Fogle, 37 Mo. 469 (1872); Foshay v. Ferguson, 2 Denio, 617 (1846); McGurn v. Brackett, 33 Me. 331 (1851); Ames v. Snider, 69 Ill. 376 (1673); Landa v. O'bert, 45 Tex. 539 (1876); Hall v. Suydam, 6 Barb. 83 (1849); Ulmer v. Leland, 1 Me. 135 (1820), Braveboy v. Cockfield, 2 McMillan, 270.

[5] 23 Ind. 67.

[6] 11 Ala. 916)1847).

that, although the defendant in an action for malicious prosecution, may not be able to show a probable cause for prosecuting the plaintiff, or the plaintiff may prove a state of facts from which the want of it is inferrible, yet, if the defendant acted under an honest belief that the plaintiff was guilty of the offense for which he was charged, no recovery can be had against him." This case may well be cited to support the common saying, that, at the present day, there is not a single legal rule but that, somewhere in the reports, an opposite decision can be found. The language of the chief justice in Chandler v. McPherson has been criticised, and the principle there laid down overruled in the same State in several later cases.[7] It is likewise in conflict with every decided case on the subject elsewhere.[8] As is well said, a party may believe on suspicion and suspect without cause, or his belief may proceed from some mental peculiarity of his own. No man's liberties and rights can be allowed to depend on the belief of another. The test of the professed sincerity of a professed belief; the proof that it is not the secret work of a heart to cover malice, can only be found in the discovery of circumstances which would authorize a reasonable man in entertaining such a belief.[9] So good faith, and honest belief standing alone are not enough. There must be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the plaintiff was guilty of the crime with which he was charged, to make out such a probable cause as will be a defense.[10] It has been held in New York that where the defendant was not the prosecutor in fact, but is sought to be made so by construction for giving false information which led to the arrest, the motive is material, and, if he acted in good faith, it is a defense to the action.[11]

Shortly, then, to constitute probable cause, the facts and circumstances upon which the defendant acted must be such as, under the circumstances, would induce men of ordinary soberness and prudence to act as the defendant did.[12] This rule will be best illustrated by a reference to the facts of a few of the most prominent cases on this branch of the law.

§ 3. *Cases where Probable Cause did not Exist.*—A mere suspicion existing in a man's mind, unsupported by circumstances which would have raised a similar suspicion in the mind of a prudent person, is not sufficient. A and a friend were on a steamboat returning from an excursion. B was also on the boat with his wife and children. One of the children had the whooping-cough, which attracted A's attention. He told his friend that he knew of a valuable remedy which had been used successfully in his own family, and said he had a great mind to go over and tell B about it. His friend advised him to do so, and A went over to where B and his wife were sitting, and, not being able to approach them in front, he tapped B on the shoulder. B looked up, and A said he wanted to speak to him; B answered, "If you have anything to say, say it here." This attracted the attention of other passengers. A said that he merely wished to speak to him concerning his child's sickness, and walked away. B replied: "You never mind about my child; you mind your own business and I will mind mine." Soon afterwards B pointed out A to a detective, and preferred a charge against him of attempting to steal a diamond pin which he wore at the time. Here it was held there was an entire absence of probable cause.[13] A robbery had been committed by A, who had absconded. B, a fellow-workman, had been heard to say that he (B) had heard a few hours after the robbery that A had absconded, and that A had previously told him that he intended going to Australia.

[7] See Long v. Rodgers, 19 Ala. 329 (1851); Ewing v. Sandford, 19 Ala. 605 (1851).

[8] Farnham v. Feeley, 56 N. Y. 451; Collins v. Hayte, 50 Ill. 353; Mowry v. Whipple, 8 R. I. 360; Jacks v. Stimpson, 13 Ill. 701 (1852); Hall v. Hawkins, 5 Humph 359 (1844); Shaul v. Brown, 28 Iowa, 37 (1869); Lawrence v. Lanning, 4 Ind. 194 (1853); Hays v. Blizzard, 30 Ind. 457 (1878); Memaur v. Mitchell, 13 Me. 437 (1830).

[9] Winnebiddle v. Porterfield, 9 Pa. St. 139 (1848).

[10] Hall v. Suydam, 6 Barb. 83 (1849).

[11] Farnham v. Feeley, 56 N. Y. 451 (1874.)

[12] Dreggs v. Burton, 44 Vt. 114; Cole v. Curtis, 16 Minn. 182; Delegal v. Highley, 3 Bing. (N. C.) 950; Bell v. Pearcey, 5 Ind. 83; Johnson v. Chambers, 10 Ind. 287; Barron v. Mason, 31 Vt. 189. Carl v. Ayres, 53 N. Y. 14; Spengler v. Davy, 15 Gratt. 381; Bauer v. Clay, 8 Kan. 581; Stone v. Stevens, 12 Com. 219; Galloway v. Stewart, 49 Ind. 188; Skidmore v. Bricker, 77 Ill. 164; Jacks v. Stimpson, 13 Ill. 71; Lawrence v. Lanning, 4 Ind. 194; Josselyn v. McAllister, 30 Mich. 45; Boyd v. Cross, 35 Md. 194; Shaul v. Brown, 28 Iowa, 37; Gee v. Patterson, 63 Me. 49.

[13] Carl v. Ayres, 53 N. Y. 14 (1873).

A had likewise been seen early in the morning after the robbery coming from a public entry leading to the back door of B's house. C, his master, hearing of these things, charged B before the magistrates with robbery. Here, also, it was held there was no probable cause for the arrest.[14]

Acting on insufficient proof through the prosecutor's own negligence, will show the absence of probable cause. L and M lived in the same house; M as tenant to L. The latter being absent from home, his daughter saw M carry some corn in a basket from the barn to the chicken coop, and feed the chickens. M and L both had corn in the barn, but the daughter, looking at her father's pile, thought some of it must have been taken. She told her father of this when he returned, and he went before a magistrate and had M arrested for larceny. Here there was no probable cause. "L could easily have learned the facts of the case by speaking with M, who was near him. He should have made more inquiry. If he really believed that M had stolen the corn, the belief arose from his own negligence."[15] "If a man," it is said in Merriam v. Mitchell,[16] "had prosecuted and imprisoned a faithful servant on the false charge of purloining an article of value which had remained locked up in his desk merely because he had carelessly overlooked it, he could not, and ought not, to rest satisfied with himself until he had made restitution. He could not reasonably expect that the claim of the injured party for damages in a court of justice could be defeated by the strength of his own assurance. If such a doctrine were established by law, innocence might, indeed, escape the punishment due to guilt, if the error were seasonably discovered; but it would be without indemnity for losses and expenses growing out of the charge, to say nothing of personal suffering and lacerated feelings. The pretense of error and unintentional mistake would become a cloak to give impunity to malice, and fraud and falsehood."

Where the prosecutor knows that the party claims a right to the property, for the taking of which he prosecutes him, this shows an absence of probable cause. H took a wagon from S's yard in the daytime, claiming it as his own, under a bill of sale to him from his brother, C. S, notwithstanding he had been told that H so claimed it, had him arrested for stealing it. Previous to the complaint, S had stated that he had sold the wagon to C. S had purchased it from one M, and paid part of the purchase money; C had afterwards paid the residue. C executed a bill of sale of it to H, the former having previously asked S to purchase it from him, which S refused. S consulted counsel before making the complaint, and the counsel advised him to prosecute, but S omitted to tell him of the bill of sale from C to H. These facts were considered as showing a want of probable cause. "I am inclined to believe," said Paige, P. J., in the Supreme Court, "that the facts are sufficient in law to make out a want of of probable cause for the prosecution of the plaintiff on the charge of larceny. It appears that the plaintiff took the wagon from the premises of the defendant in the daytime, claiming it under a bill of sale from his brother; that the same day he took the wagon he told a witness, with whom the top and seat had been left to be repaired, that he had taken it, and that he claimed it as his own, and showed the bill of sale under which he claimed it, and sent word by this witness to the defendant that he had taken the wagon. It also appears that this witness, the same day, delivered to the defendant the plaintiff's message, and told the defendant that the plaintiff claimed the wagon under the bill of sale from his brother. And it also appears that the defendant received all this information before he made the complaint against the plaintiff for stealing the wagon. It seems to me that these facts were sufficient evidence of the want of probable cause."[17] A took a bank note in the course of his business and paid it to B. The note was afterwards stopped at the bank as a forged note, and was brought by the bank inspector to A, who immediately paid to B the amount of the note, but refused to give the note up to the inspector, insisting on his right to retain it, in order to recover the amount from the person from whom he received it. The inspector had

[14] Busst v. Gibbons, 30 L. J. (Ex.) 75 (1861).
[15] Lacy v. Mitchell, 28 Ind. 67 (1864).
[16] 13 Me. 439 (1836).
[17] Hall v. Suydam, 6 Barb. 83 (1849); Weaver v. Townsend, 14 Wend. 192 (1835).

A arrested and brought before a magistrate on a charge of having feloniously a note in his possession, knowing it to be forged. In an action by A against the inspector, Lord Ellenborough ruled that there was an entire absence of probable cause for the arrest[18].

§ 4. *Cases where Probable Cause Existed.* —That a homicide has been committed, is probable cause for commencing a prosecution against the perpetrator. A street-car driver ran his car over a young child and killed him. His uncle had him arrested for killing the child; he was bound over, but the grand jury ignored the bill. He thereupon brought an action for malicious prosecution, and obtained a verdict in the court below. The Supreme Court of Pennsylvania, in which State the case arose, held that the plaintiff should have been nonsuited. "I presume it is the first time in the history of judicial proceedings," said Thompson, C. J., "that a prosecution for a homicide, unmistakably committed, begun before it could be known whether it was wilful, negligent or accidental, the prosecutor was ever punished for putting the law in motion to ascertain whether there was guilt in it or not. As all homicides are presumably unlawful, the fact of itself is probable cause for proceeding against the perpetrator. * * * * If there ever was a case in which it was the duty of a court to declare the law, it was here. There was a homicide, scarcely by misadventure, certainly not so, when the prosecution was instituted; committed in open day, in a broad, straight street, and without excuse at first, and at last the only excuse the perpetrator gave was that he kept his eyes straight ahead while driving, and drove over the child without seeing it. If there was not probable cause for a prosecution for murder or manslaughter here, and so to be pronounced by the court, there never will be again. The court erred in not so pronouncing."[19] So an intentional killing of another with a deadly weapon, is sufficient to constitute probable cause for arresting the actor, though a jury may find that it was done in self-defense.[20]

Other instances of probable cause are shown in the following cases: W was a marine-store dealer, who bought old sacks to be used in the manufacture of paper. T, a miller, who lost many sacks every year from his customers not returning them, and who never sold any of his old sacks, or gave any one authority to do so, saw a number of sacks covered with a tarpaulin, lying on a wharf near a vessel. Seeing his mark on one, he cut it open and found that it contained pieces of sacks, some new, some old. He removed the tarpaulin and saw some sacks on which was his mark; on others it was cut away. Being told that they were about to be shipped by W for the manufacture of paper, he laid an information before a magistrate that he had reason to suspect that some sacks, his property, had been stolen, and were then in the possession of W. Under this a search-warrant was issued, and W was arrested and taken before a magistrate, who dismissed the charge. W sued T for malicious prosecution. Bramwell, J.: "The defendant, who is a miller, swore that he lost a thousand sacks a year by his customers not returning them. It was forcibly argued, how could he, under such circumstances, say that the sacks were stolen from him; and if not, how could he say that they were stolen from anybody else? The answer is, he does not say they were stolen, but he believes they were. Then the question is, whether a person who has lost a thousand sacks through his customers not returning them, upon seeing a package of sacks about to be sent away for the purpose of being converted into paper, some of the sacks having his mark upon them, some being new, others old, and many cut into pieces, may not reasonably think that they have been stolen? It is an important fact that some of the sacks were new; for if they had all been old and unfit for use, there would have been no ground for thinking that they were stolen; but some of them being new, it seems to me impossible to say that there was an absence of reasonable and probable cause for so thinking." Channell, B.: "I agree that all the circumstances of suspicion are explained, and that the plaintiff is involved in no imputation whatever; but we must look at what operated on the mind of the defendant at the time he laid the information. He saw a tarpaulin, the use of which is now explained, and he saw enough to satisfy him that his property was

[18] Brooks v. Warwick, 2 Stark. 389 (1818).
[19] Dietz v. Langfitt, 63 Pa. St. 239 (1869).
[20] Glaze v. Whitley, 5 Oregon, 164 (1874)

covered by that tarpaulin. He found severa sacks with his mark upon them, and also pieces of sacks, some new and some old, which he identified. It seems to me that there was no want of such reasonable and probable cause for the information as would entitle the plaintiff to maintain an action either in respect of the search-warrant or the arrest." A, an old man of eighty years of age, caused a warrant to be issued against B, charging him with the crime against nature. B was arrested, and on the trial A swore positively to having witnessed the act; and although B was acquitted, continued his reiteration of the truth of the charge. It was shown that A was very infirm at the time he alleged the offense was committed; that he was nearly blind and forgetful, his mind being much impaired by age, so that he was liable to be deceived, and could not distinguish defects at any distance. The court held that there was probable cause. "We can not say," said Woodworth, J., "there was a want of probable cause, although it may satisfactorily appear that the defendant, owing to defective sight, advanced age and bodily infirmity, was mistaken. There is no sufficient reason for believing that he was not persuaded of the truth of the fact related by him under oath; and though the plaintiff was acquitted, it is possible the defendant may have been correct. At any rate, his statement may be considered as probable cause."[21] M sued D and A in an action of malicious prosecution for causing his arrest on a charge of murder, upon which he was committed to jail, remaining a week, when he was discharged by the court. It appeared that at the request of D and A, a magistrate went to the house of one J to take the examination of his daughter Miranda. Being asked by A to do so, she stated to the magistrate that she had lived in M's house about a year previous; that a stranger came there one evening and put up for the night; that he took his saddle-bags and together with one R, a sheep drover, who boarded there, sat up most of the night; that in the morning the stranger came down stairs and asked for some water to wash; that he went out of the back door to the pump, and on his return was met by M, who struck him on the head with a club and killed him; that M, his son and R carried the body away before daylight, and that M, on his return, took her into a room and told her that if she ever said anything about it he would kill her. While the examination was going on, M entered the room saying that he had heard that something was going on in relation to him, and he wanted to hear what it was. Miranda appeared much afraid at his appearance, and immediately ran out of the room. She had previously acted timidly and strangely. When M entered the room, the magistrate had taken down her story, but she had not sworn to it, and going after her for this purpose, he found that she was not in a fit condition to take the oath. On the trial of the case, Miranda testified that she had no recollection of saying that M had killed a man; and her husband swore that he had heard her, when under the influence of fits, to which she was subject, speak of the murder, but when in her right mind, she said nothing about it. Search was made for the body of the supposed murdered man, but without success. D and A attended Miranda as physicians, and a long-continued hostility between them was proved; that they had been engaged in law suits and had preferred indictments against each other. It was held that probable cause existed. "The essential ground of this action," said Sutherland, J., "is that a legal prosecution has been carried on without a probable cause. The evidence in the case failed to establish that fact. The defendants took an active agency in procuring the complaint to be made and the plaintiff to be arrested; but if they believed the story of Miranda Johnson, they did in this no more than their duty. Miranda Johnson repeated the same story to Judge Chandler, upon the strength of which he issued a warrant for the arrest of the plaintiff. Her story was told to several persons who seemed to have believed it. Her parents appear to have believed it, and although she was infirm in mind and body, and subject to fits, it does not appear that her declarations were considered unworthy of credit or belief. A jury certainly would not be justified, on the evidence in this case, in saying that there was no probable cause for the proceedings against the plaintiff, although they might believe that the defendants were actuated by improper and malicious motives. But malice alone will not

[21] Burlingame v. Burlingame, 8 Cow. 141 (1828).

sustain the action. It requires malice and the want of probable cause."[22]

§ 5. *Evidence of Want of Probable Cause.*—A magistrate's discharge upon a warrant of felony is *prima facie* evidence of want of probable cause;[23] and so is an acquittal of larceny after a full investigation,[24] or the ignoring of a bill by the grand jury.[25] But none of these are conclusive.[26] And it is held that the discharge from the prosecution by a *nolle prosequi* is not *prima facie* evidence of a want of probable cause.[27]

JOHN D. LAWSON.

St. Louis, Mo.

[22] Murray v. Long, 1 Wend. 140 (1828).
[23] Bostick v. Rutherford, 4 Hawk. 137 (1825).
[24] Strauss v. Young, 36 Md. 246 (1872).
[25] Sappington v. Watson, 50 Mo. 83.
[26] Cooper v. Allenback, 37 Md. 282; Fleckinger v. Wagner, 46 Md. 581; Mitchinson v. Cross, 58 Ill. 366; Israel v. Brooks, 23 Ill. 575.
[27] Fleckinger v. Wagner, 46 Md. 580; Yocum v. Poly, 1 B. Mon. 358.

POLICE OFFICERS INDUCING THE COMMISSION OF CRIME.

Again, we have the police playing corrupters under the cloak of the law. In a case which has just come before Mr. Mansfield, one of the London police-magistrates, in which a public-house keeper was prosecuted, at the instance of the Treasury, for permitting her premises to be used for betting purposes, and her manager was summoned for having used the house for like purposes, a detective figures in the double capacity of being himself one of those who employed the manager in betting transactions, and of being subsequently a witness to disclose them on behalf of the prosecution. The worthy magistrate, as the *Times* reports, said "he was of opinion that no betting had been proved in the case. The manager, a young man, was going down to Hampton Races, and undertook as a commission agent to lay out some money for the constable, and did so with some of his own. He considered the conduct of the police simply abominable, and that their conduct was worse than that of the persons charged. He could not understand the Treasury taking up such a case. The constables might have gone to see what took place, but ought not to make bets and drink with people." This time last year, another such case came before a New York police court, on a charge against a lottery-dealer, who had been inveigled into transacting a little business with a person sent into her place by the police as a decoy, when, turning to the constable who made the arrest, the magistrate remarked: "I must say, officer, that I do not at all approve of the means you employed to make this arrest, but I suppose I will have to hold this woman."[1] Nor is it many months since, in England, a conviction for procuring abortion was obtained by the police against Titley by laying a trap for him; while only the other day a conviction was quashed in Scotland, where, but for the solicitations and inducements of the police, the offense would not have been committed. Quite recently, too, we had occasion to comment on another English case of this kind, and a similar American one; nor do those instances exhaust the category, for we find a Michigan case referred to,[2] where a person desiring to steal some important papers from a court-room asked the policeman in charge to leave the door unlocked, and the latter, after consulting with his superior officer, agreed to do this, and the defendant fell into the trap. "Scandalous and reprehensible," Campbell, C. J., thought those proceedings; and Marston, J., said: "Some courts have gone a great way in giving encouragement to detectives in some very questionable methods adopted by them to discover the guilt of criminals; but they have not yet gone so far, and I trust never will, as to lend aid or encouragement to officers who may, under a mistaken sense of duty, encourage and assist parties to commit crime, in order that they may arrest and have them punished for so doing. The mere fact that the person contemplating the commission of the crime is supposed to be an old offender can be no excuse, much less a justification for the course adopted and approved in this case. * * * * Human nature is frail enough at best, and requires no encouragement in wrong-doing. If we can not assist another and prevent him from violating the laws of the land, we at least should abstain from any active efforts in the way of

[1] 11 Cent. L. J. 299.
[2] *Supra.*

leadiug him into temptation. Desire to commit crime and opportunities for the commission thereof would seem sufficiently general and numerous, and no special efforts would seem necessary in the way of encouragement or assistance in that direction." But, as it is said, in Dodge v. Brittain,[3] "A man may direct a servant to appear to encourage the design of the thieves, and to lead them on till the offense is complete, so long as he did not induce the original intent, but only provided for its discovery after it was formed. * * If a man is suspected of an intent to steal, and another to try him leaves his property in his way, which he takes, he is guilty of larceny. But it would not be the case if the master had directed the servant to deliver the property to the thief, instead of directing him to furnish facilities for his arriving at the place where it was kept." In Sanders v. State,[4] by direction of the prosecutor, thieves informed that on a given night he would be away from home; the thieves came and were taken in the act; and it was held by the Supreme Court of Tennessee, that the prosecutor did not consent to the taking, and that the thieves were properly convicted. And see Kemp v. State.[5] When Boswell told how a master, suspecting the honesty of his apprentice, laid some marked money in his way, which the apprentice appropriated, and how the thief was discharged, and the master imprisoned by the judge, who said that of the two the tempter was the greater criminal, Dr. Johnson commended the justice of the sentence. But, though the great moralist may have been right enough from his own point of view, the learned judge who delivered this equitable decision would hardly find authority in his favor. For, though in larceny the taking must be *invito domino*, an apparent exception to this rule occurs where the owner, receiving intimation of the proposed theft, resolves to allow it to be carried out in order to convict the thief;[6] but, where he, through a third party, procured others to commit a robbery in order that he might get the reward upon conviction, it was held not to be robbery.[7] Many cases, too, might be referred to where post-office employees have been convicted for stealing, through the means of test letters containing marked coin, etc.[8] This subject was well discussed in a recent American case,[9] where Treat, J., observed: "It must be conceded that contrivances to induce crime (the contriver confederating for the purpose with the criminal), are most rigidly scrutinized by the courts, even when the contrivances are lawful in themselves. But when the contrivances are of an unlawful character, should not courts be even more strict? * * No court should, even to aid in detecting a supposed offender, lend its countenance to a violation of positive law or contrivances for inducing a person to commit a crime. Although a violation of law by one person, in order to detect an offender, will not excuse the latter or be available to him as a defense, yet resort to unlawful means is not to be encouraged. When the guilty intent to commit has been formed, any one may furnish opportunities or even lend assistance to the criminal, with the commendable purpose of exposing and punishing him. But no case has been found which goes beyond these views. There are legitimate means and jurisdictions where offenses can be tried and punished, and the public weal is best subserved where rigid adherence thereto is enforced." With no observations could we better conclude, than by quoting those of the London *Law Times* on the case mentioned in the opening of this paper: "The practice, which now seems unfortunately to be rapidly becoming an established one, of the guardians of the law themselves violating it in order to secure the punishment of any individual whom they may suspect of a disposition to evade it, is really one which demands the attention of the authorities. When a master puts marked money into his till, or incloses it in a letter, he does nothing more than endeavor to obtain evidence of wrong-doing; he does nothing calculated to

[3] Meig's R. 84.
[4] Sept. 1879.
[5] 11 Humph. 320.
[6] R v. Eggington, 2 Leach, 913; 2 East, P. C. 666; 2 B. & P. 58; Dodge v. Brittain, Meigs, 84, 86; Alexander v. State, 12 Texas, 540.
[7] R v. MacDaniel, Fost. 121, 128; cf. State v. Covington, 2 Bailey, 569.
[8] R v. Young, 2 C. & K. 466; R v. Rathbone, C. & M. 220; 2 Moo., C. C. 242; R v. Shepherd, 1 Dears. C. C. R. 606; 25 L. J. M. C. 52; 2 Jur. N. S. 96; R v. Gardner, 1 C. & K. 628; R v. Williams, 1 C. & K. 195; R v. Mence, 1 C. & M. 234; United States v. Cottingham, 2 Blatch. 470.
[9] United States v. Whittier, 7 Cent. L. J. 51.

corrupt the morals of any one disposed to be honest. But it is quite another thing when those, whose business it is to detect crime, themselves created it in the first instance. This is not unlike a practice ascribed to the police of some continental nations, of inventing a plot for the assassination of the Sovereign, in order that they may get the credit of discovering it. But the new development in this country is far more pernicious than that comparatively harmless stratagem, since a crime is not merely simulated, it is actually committed, and those to whom the suppression of crime is intrusted place themselves in the position of *participes criminis*, and suppress indeed a crime, but one of their own making."—*Irish Law Times.*

CORPORATIONS—ULTRA VIRES—COLLATERAL UNDERTAKINGS.

DAVIS v. OLD COLONY R. CO; DAVIS v. SMITH AMERICAN ORGAN CO.

Supreme Judicial Court of Massachusetts, June, 1881.

1. A contract by a railroad corporation to pay, or guarantee, the expenses of a "world's peace jubilee and international musical festival," is neither a necessary nor appropriate means of carrying on its business, and is *ultra vires*, and can not bind it by reason of benefit to be derived from possible increase of passengers over its road.

2. The power to manufacture and sell goods of a particular description does not include the power to partake in, or to guarantee, the profits of an enterprise that may be expected to increase the use or demand for such goods.

M. F. Dickinson, Jr., and *Jabez Fox*, for plaintiffs; *Charles Allen*, *R. D. Smith* and *J. H. Benton, Jr.*, for defendants.

GRAY, C. J., delivered the opinion of the court:

These actions are brought upon an agreement, signed by the Old Colony Railroad Company in the sum of $6,000, and by the Smith American Organ Company in the sum of $5,000, and by other corporations, partnerships and individuals in various sums, amounting in all to more than $200,000.

The agreement is in these words: "Boston, January 23, 1872. We, the undersigned subscribers, hereby agree, each with the other, that we will contribute towards any deficiency (should there be one) that may arise towards defraying the expenses of the World's Peace Jubilee and International Musical Festival, to be held in Boston, commencing on the 17th of June and closing on the 4th of July next, in such proportions as the amounts affixed to our several names bear to the whole amount subscribed; provided that no subscription shall be binding until the whole amount subscribed shall reach the sum of two hundred thousand dollars, and that no expenditure be incurred except under the authority of the executive committee, which committee shall represent the subscribers, and consist of ten or more persons, who may be chosen by the first six subscribers hereto."

At the trial of the first action, the plaintiffs offered to prove that the signature of each corporation was made by authority of its directors, with the reasonable belief that the holding of the festival proposed would be of great pecuniary benefit to the corporation by increasing its proper business, and that the signature would promote such holding; that the festival was held as mentioned in the agreement of guaranty; and that the reasonable expenditures therefor, made under authority of the plaintiffs, who relied upon that agreement in making them, exceeded the receipts by more than $200,000.

The only point argued and decided when one of these cases was before us upon demurrer to the declaration was, that the promise of the subscribers was to the executive committee therein mentioned, and that these plaintiffs as such committee were the proper parties to sue thereon. Davis v. Smith American Organ Co., 117 Mass. 456.

The principal question now presented by the answer, and which lies at the threshold of each case, is whether it was within the power of the defendant corporation to bind itself by such an agreement. Upon full consideration of the elaborate arguments of counsel upon that question the court is of opinion that the agreement is *ultra vires*, and therefore no action can be maintained upon it against either defendant.

The reported cases on the subject are so numerous, that we shall refer to comparatively few of them, except the principal cases in England and the decisions of the Supreme Court of the United States and of this court.

A corporation has power to do such business only as it is authorized by its act of incorporation to do, and no other. It is not held out by the government, nor by the stockholders, as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person, or of an ordinary partnership, but with such only as its charter confers. If it exceeds its chartered powers, not only may the government take away its charter, but those who have subscribed to its stock may avoid any contract made by the corporation in clear excess of its powers. If it makes a contract manifestly beyond the power conferred by its charter, and therefore unlawful, a court of chancery, on the application of a stockholder, will restrain the corporation from carrying out the contract; and a court of common law will sustain no action on the contract against the corporation.

Every person who enters into a contract with a corporation is bound at his peril to take notice of

the legal limits of its capacity, especially where, as in this Commonwealth, all acts of incorporation are deemed public acts, and every corporation organized under general laws is required to file in the office of the secretary of the Commonwealth a certificate showing the purpose for which the corporation is constituted. Gen. Stats. c. 3, sec. 5; Stat. 1870, c. 224, secs. 7, 11; Whittenton Mills v. Upton, 10 Gray, 582, 598; Richardson v. Sibley, 11 Allen, 65, 72; Pearce v. Madison, etc. Ry., 21 How. 441, 443; East Anglian Rys. v. Eastern Counties Ry., 11 C. B. 775, 811; Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653.

There is a clear distinction, as was pointed out by Mr. Justice Campbell in Zabriskie v. Cleveland, etc. Ry., 23 How. 381, 398; by Mr. Justice Hoar in Monument Bank v. Globe Works, 101 Mass. 57, 58, and by Lord Chancellor Cairns and Lord Hatherley, in Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 668, 684, between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice; and the abuse of a general power, or the failure to comply with prescribed formalities or regulations, in a particular instance, when such abuse or failure is not known to the other contracting parties.

In the leading case of Colman v. Eastern Counties Ry., 10 Beav. 1, the directors of a railway company were restrained by injunction from carrying out an agreement by which, for the purpose of increasing its profits, they proposed to guaranty certain profits to, and to secure the capital of, a steam packet company, to ply between a port near one end of the railway in England and certain foreign ports; and Lord Langdale, M. R., said: "To look upon a railway company in the light of a common partnership, and subject to no greater vigilance than common partnerships are, would, I think, be greatly to mistake the functions which they perform, and the powers which they exercise of interference, not only with the public but with the private rights of all individuals in this realm. We are to look upon those powers as given to them in consideration of a benefit which, notwithstanding all other sacrifices, it is to be presumed and hoped, on the whole, will be obtained by the public. But it being the interest of the public to protect the private rights of all individuals, and to defend them from all liabilities beyond those necessarily occasioned by the powers given by the several acts, those powers must always be carefully looked to; and I am clearly of opinion, that the powers which are given by an act of Parliament, like that now in question, extend no farther than is necessarily and properly required for carrying into effect the undertaking and works which the act has expressly sanctioned." "Ample powers are given for the purpose of constructing and maintaining the railway, and for doing all those things required for its proper use when made; but I apprehend that it has nowhere been stated that a railway company, as such, has power to enter into all sorts of other transactions. Indeed, it has been very properly admitted, that railway companies have no right to enter into new trades or businesses not pointed out by their acts; but it has been contended that they have a right to pledge, without limit, the funds of the company for the encouragement of other transactions, however various and extensive, provided the object of that liability is to increase the traffic upon the railway and thereby increase the profit to the shareholders. There is, however, no authority for anything of that kind. It has been stated, that these things, to a small extent, have frequently been done since the establishment of railways; but unless the acts so done can be proved to be in conformity with the powers given by the special acts of Parliament, under which those acts are done, they furnish no authority whatever." 10 Beav. 14, 15. And after full consideration of the case he summed up his opinion thus: "To pledge the funds of this company for the purpose of supporting another company engaged in a hazardous speculation, is a thing which, according to the terms of this act of Parliament, they have not a right to do." "They have the power to do all such things as are necessary and proper for the purpose of carrying out the intention of the act of Parliament, and they have no power of doing anything beyond it." 10 Beav. 17, 18. See, also, Salomons v. Laing, 12 Beav. 339, 352, 353.

In Bagshaw v. Eastern Union Railway, 7 Hare, 114; 2 Macn. & Gord. 389, and 2 Hall & Twells, 201; where a railway company, authorized by act of Parliament to purchase a branch line, and to raise a sum of money for the purpose of constructing that line, applied part of the sum so raised to the construction of its main line, Vice-Chancellor Wigram, and Lord Chancellor Cottenham on appeal, sustained the bill of a shareholder, not only to restrain such application of the rest of the sum, but also for an account of the part already illegally expended.

The same principles have been frequently applied in actions at law. In East Anglian Railways v. Eastern Counties Railway, 11 C. B. 775, it was held that no action could be maintained by one railway company against another upon an agreement made by the latter to take a lease of the railway of the first company, and to pay the expenses incurred by that company in the soliciting and promoting of bills in Parliament for the extension and improvement of that railway, even if the object and effect of the agreement were to increase the profits of the defendants' railway; and Chief Justice Jervis, in delivering the judgment of himself and Justices Maule, Williams and Talfourd, said: "This act is a public act, accessible to all, and supposed to be known to all; and the plaintiffs must therefore be presumed to have dealt with the defendants with a full knowledge of their respective rights, whatever those

rights may be. It is clear that the defendants have a limited authority only, and are a corporation only for the purpose of making and maintaining the railway sanctioned by the act; and that their funds can only be applied for the purposes directed and provided for by the statute. Indeed, it is not contended that a company so constituted can engage in new trades not contemplated by their act; but it is said that they may embark in other undertakings, however various, provided the object of the directors be to increase the profits of their own railway. This, in truth, is the same proposition, in another form; for, if a company can not carry on a new trade, merely because it was not contemplated by the act, they can not embark in other undertakings not sanctioned by their act, merely because they hope the speculation may ultimately increase the profit of the shareholders. They can not engage in a new trade, because they are a corporation only for the purpose of making and maintaining the Eastern Counties Railway. What additional power do they acquire from the fact that the undertaking may in some way benefit their line? Whatever be their object, or the prospect of success, they are still but a corporation for the purpose of only making and maintaining the Eastern Counties Railway; and if they can not embark in new trades, because they have only a limited authority, for the same reason they can do nothing not authorized by their act, and not within the scope of their authority. Every proprietor, when he takes shares, has a right to expect that the conditions upon which the act was obtained will be performed; and it is no sufficient answer to a shareholder, expecting his dividend, that the money has been expended upon an undertaking which at some remote period may be highly beneficial to the line. The public also has an interest in the proper administration of the powers conferred by the act. The comfort and safety of the line may be seriously impaired if the money supposed to be necessary, and destined by Parliament for the maintenance of the railway, be expended in other undertakings not contemplated when the act was obtained, and not expressly sanctioned by the legislature." "If the contract is illegal, as being contrary to the act of Parliament, it is unnecessary to consider the effect of dissentient shareholders; for if the company is a corporation only for a limited purpose, and a contract like that under discussion is not within their authority, the assent of all the shareholders to such a contract, though it may make them all personally liable to perform such contract, would not bind them in their corporate capacity, or render liable their corporate funds," 11 C. B. 811-813. So, in Macgregor v. Dover & Deal Railway, 18 Q. B. 618, the Court of Exchequer Chamber, in an opinion delivered by Baron Alderson, in which Justices Maule, Cresswell, Williams and Talfourd and Baron Platt concurred, arrested judgment in an action brought by the Dover & [illegible] Railway Company upon the agreement of a person, interested in the Southeastern Railway Company to pay the expenses of an application of the latter to Parliament to authorize it to establish a connecting railway, because "both plaintiffs and defendant here must be taken, with full knowledge of the powers conferred on the Southeastern Railway Company, to have made a contract by which the defendant is to bind the company to do an illegal act; not merely an act which they have no power to do, but an act contrary to public policy and the provisions of a public act of Parliament." 18 Q. B. 632. In each of those cases, the plaintiff had actually incurred and paid the expenses sued for.

Baron Parke stated the rule to be that where a corporation is created by act of Parliament for particular purposes with special powers, "their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires*—that is, that the legislature meant that such a deed should not be made." South Yorkshire Railway v. Great Northern Railway, 9 Exch. 55, 84. See, also, Scottish Northeastern Railway v. Stewart, 3 Macq. 382, 415, by Lord Wensleydale.

Lord St. Leonards—while asserting that "the safety of men in their daily contracts requires that this doctrine of *ultra vires* should be confined within narrow bounds;" and that railway companies "have all the powers incident to a corporation, except so far as they are restrained by their act of incorporation," and are "bound by contracts duly entered into by their directors for purposes which they have treated as within the objects of their acts, and which can not clearly be shown not to fall within them;" and inclining "to restrain the doctrine of *ultra vires* to clear cases of excess of power, with the knowledge of the other party, express, or implied from the nature of the corporation and of the contract entered into"—distinctly recognized that "directors can not act in opposition to the purpose for which their company was incorporated," nor "bind their companies by contracts foreign to the purposes for which they were established." Eastern Counties Railway v. Hawkes, 5 H. L. Cas. 331, 371, 373, 381.

Lord Chancellor Cranworth, in the same case, said that the English authorities above cited, had "established the proposition, that a railway company can not devote any part of its funds to an object not within the scope of its original constitution, how beneficial soever that object might seem likely to prove;" and, after a review of the cases, repeated, "It must therefore now be considered as a well-settled doctrine, that a company incorporated by act of Parliament for a special purpose can not devote any part of its funds to objects unauthorized by the terms of its incorporation, however desirable such an application may appear to be." 5 H. L. Cas. 345, 348. His opin-

ion, in which Lord Brougham concurred, upon which the House of Lords held that no action would lie against a railway company on an agreement of its projectors to advance money to construct a pier and harbor at the end of a proposed branch of the railway, is to the like effect. Caledonian & Dumbartonshire Railway v. Magistrates of Helensburgh, 2 Macq. 391, 416, 417, 422. And he afterwards observed that he thought the statement of Baron Parke, above quoted, "the more correct way of enunciating the doctrine, though practically it makes very little difference whether we say that the railway company has no authority given to it by its incorporation to enter into contracts as to matters not connected with its corporate duties, or that it is impliedly prohibited from so doing, because by necessary inference the legislature must be considered to have intended that no such contracts should be entered into." Shrewsbury, etc. Ry. v. Northwestern Ry., 6 H. L. Cas. 113, 135-137.

In Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7, H. L. 653, and L. R. 9 Ex. 224, the objects for which a company, registered under the English Joint Stock Companies Act of 1862, was created, were stated in its memorandum of associaiton to be "to make and sell or lend on hire railway carriages and wagons, and all kinds of railway plant, fittings, machinery and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work and sell mines, minerals, land and buildings; to purchase and sell, as merchants, timber, coal, metals or other materials, and to buy and sell any such materials on commission or as agents." The directors agreed to purchase a concession for making a railway in a foreign country, and afterwards (on account of difficulties existing by the law of that country) agreed to assign the concession to an association formed there, which was to supply the materials for the construction of the railway, and to receive periodical payments from the English company. In an action at law brought by the foreign associates against the English company upon this agreement, it was held in the lower courts, as well as in the House of Lords, to be *ultra vires*. The judges below were divided upon the question whether it had been ratified by the stockholders so as to bind the company. But in the House of Lords it was unanimously held, by Lord Chancellor Cairns and Lords Chelmsford, Hatherley, O'Hagan and Selborne, that the contract was not within the scope of the memorandum of association, and was therefore void and incapable of being ratified, and the action could not be maintained.

Lord Selborne said: "The action in this case is brought upon a contract, not directly or indirectly to execute any works, but to find capital for a foreign railway company, in exchange for shares and bonds of that company. Such a contract, in my opinion, was not authorized by the memorandum of association of the Ashbury Company. All your lordships, and all the judges in the courts below, appear to be, so far, agreed But this, in my judgment, is really decisive of the whole case. I only repeat what Lord Cranworth, in Hawkes v. Eastern Counties Railway Company (when moving the judgment of this House), stated to be settled law, when I say that a statutory corporation, created by act of Parliament for a particular purpose, is limited, as to all its powers, by the purposes of its incorportion as defined in that act. The present and all other companies, incorporated by virtue of the Companies Act of 1862, appear to me to be statutory corporations within this principle. The memorandum of association is under that act their fundamental, and (except in certain specified particulars) their unalterable law; and they are incorporated only for the objects and purposes expressed in that memorandum. The object and policy of those provisions of the statute which prescribe the conditions to be expressed in the memorandum, and make these conditions (except in certain points) unalterable, would be liable to be defeated if a contract under the common seal, which on the face of it transgresses the fundamental law, were not held to be void, and *ultra vires* of the company, as well as beyond the power delegated to its directors or administrators. It was so held in the case of East Anglian Railway Company, and in other cases upon railway acts, which cases were approved by this House in Hawkes' Case; and I am unable to see any distinction for this purpose between statutory corporations under railway acts, and statutory corporations under the Joint Stock Companies' Act of 1862." "I think that contracts for objects and purposes foreign to, or inconsistent with, the memorandum of association are *ultra vires* of the corporation itself. And it seems to me far more accurate to say that the inability of such companies to make such contracts rests on an original limitation and circumscription of their powers by the law, and for the purposes of their incorporation, than that it depends upon some express or implied prohibition, making acts unlawful which otherwise they would have had a legal capacity to do. This being so, it necessarily follows (as indeed seems to me to have been conceded in Mr. Justice Blackburn's judgment) that, where there could be no mandate, there can not be any ratification; and that the assent of all the shareholders can make no difference when a stranger to the corporation is suing the company itself in its corporate name, upon a contract under the common seal. No agreement of shareholders can make that a contract of the corporation, which the law says can not and shall not be so." L. R. 7 H. L. 693-695.

In the very recent case of Attorney General v. Great Eastern Ry., 5 App. Cas. 473, 478, in which the contract in question was held to be expressly authorized by the terms of the act of Parliament, and therefore not *ultra vires*, Lord Chancellor Selborne, while expressing the opinion that "this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that what-

ever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*," declared his sense of the importance of maintaining the doctrine of *ultra vires*, as explained in the case of Ashbury Railway Carriage & Iron Co. v. Riche. And Lord Blackburn said, "That case appears to me to decide at all events this, that where there is an act of Parliament creating a corporation for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited; and consequently that the Great Eastern Company, created by act of Parliament for the purpose of working a line of railway, is prohibited from doing anything that would not be within that purpose;" although he also agreed "that those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited." 5 App. Cas. 481.

These statements are the more significant, because Baron Bramwell in the same case below (11 Ch. D. 449, 501-503, had cast doubts upon the correctness of the decision in the case of East Anglian Rys. v. Eastern Counties Ry.; and Lord Blackburn himself, when a justice of the Court of Queen's Bench, had more than once approved Baron Parke's form of stating the doctrine. Chambers v. Manchester, etc. Ry., 5 B. & S. 588, 610; Taylor v. Chichester, etc. Ry., L. R. 2 Ex. 356, 384; Riche v. Ashbury Railway Carriage & Iron Co., L. R. 9 Ex. 264.

The same principles have been clearly and positively enunciated in two unanimous judgments of the Supreme Court of the United States.

In Pearce v. Madison, etc. Ry., 21 How. 441, two corporations, created by the laws of Indiana to construct distinct, though connecting, lines of railroad in that State, were consolidated by agreement, and conducted the business of both lines under a common board of management, which gave notes in the name of the consolidated company in payment for a steamboat, which was to be employed on the Ohio River to run in connection with the railroads. After the execution of the notes and the acquisition of the steamboat, this relation between the corporations was legally dissolved. It was held, that an action brought by an indorsee against the two corporations upon the notes could not be maintained.

Mr. Justice Campbell, in delivering judgment, said: "The rights, duties and obligations of the defendants are defined in the acts of the legislature of Indiana, under which they were organized, and reference must be had to these, to ascertain the validity of their contracts. They empower the defendants respectively to do all that was necessary to construct and put in operation a railroad between the cities which are named in the acts of incorporation. There was no authority of law to consolidate these corporations, and to place both under the same management, or to subject the capital of the one to answer for the liabilities of the other; and so the courts of Indiana have determined. But, in addition to that act of illegality, the managers of these corporations established a steamboat line to run in connection with the railroads, and thereby diverted their capital from the objects contemplated by their charters, and exposed it to perils for which they afforded no sanction. Now persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. Their powers are conceded in consideration of the advantage the public is to receive from their discreet and intelligent employment, and the public have an interest that neither the managers nor stockholders of the corporation shall transcend their authority."

He then referred with approval to the cases of Colman v. Eastern Counties Ry., East Anglian Rys. v. Eastern Counties Ry., and Macgregor v. Dover, etc. Ry., above cited, and added: "It is contended that, because the steamboat was delivered to the defendants, and has been converted to their use, they are responsible. It is enough to say, in reply to this, that the plaintiff was not the owner of the boat, nor does he claim under an assignment of the owner's interest. His suit is instituted on the notes, as an indorsee; and the only question is, Had the corporation the capacity to make the contract, in the fulfillment of which they were executed? The opinion of the court is, that it was a departure from the business of the corporation, and that their officers exceeded their authority." Judgment was rendered for the defendants. It is to be observed that in that case there was no suggestion that the plaintiff took the notes sued on without notice of the illegality in the original consideration, which would have presented a different question. Lexington v. Butler, 14 Wall. 282; Macon v. Shores, 97 U. S. 272; Monument Bank v. Globe Works, 101 Mass. 57.

In Thomas v. Railroad Co., 101 U. S. 71, a railroad corporation, without authority of the legislature, leased its railroad to three persons for twenty years, for the consideration of one-half of the gross sums collected from the operation of the road by the lessees during the term, reserving the right at any time to terminate the contract and retake possession of the road, paying such damages for the value of the unexpired term as should be determined by arbitration. At the end of five years the corporation resumed possession, and the accounts for that period were adjusted and paid. It was held that no action could be maintained against the corporation to recover the value of the unexpired term. The opinion was delivered by Mr. Justice Miller.

It was argued by counsel for the plaintiffs in that case, that though there was nothing in the language of the charter which authorized the making of this agreement, yet "a corporate body may (as at common law) do any act which is not either expressly or impliedly prohibited by its

charter; although where the act is unauthorized by the charter, a stockholder may enjoin its execution; and the State may, by proper process, forfeit the charter." But the court said: "We do not concur in this proposition. We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." The court, then, after referring to some of the English cases above cited, and particularly to the decision of the House of Lords in Ashbury Railway Carriage & Iron Co. v. Riche, as establishing "the broad doctrine that a contract not within the scope of the powers conferred on the corporation, can not be made valid by the assent of every one of the shareholders; nor can it by any partial performance become the foundation of a right of action," expressed the opinion that that decision "represents the decided preponderance of authority, both in this country and in England, and is based upon sound principle."

The court further said: "There is another principle of equal importance and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract. That principle is that, where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy." This proposition is supported by the cases there cited, and by many others. See Richardson v. Sibley, 11 Allen, 65, 67; Whittenton Mills v. Upton, 10 Gray, 582; Proprietors of Locks and Canals v. Nashua, etc. R. Co., 104 Mass. 1; Middlesex Railroad v. Boston, etc. R. Co., 115 Mass. 347. But that the decision was not intended to be put exclusively upon this ground, is manifest from the terms in which it was introduced, as well as from those in which the general doctrine has been already laid down, and from the concluding sentence of the opinion.

The judgments of the English courts, and of the Supreme Court of the United States, to which we have referred, do but affirm and apply principles long ago declared by this court.

More than fifty years since, Chief Justice Parker said: "The power of corporations is derived only from the act, grant, charter or patent by which they are created. In this Commonwealth the source and origin of such power is the legislature, and corporations are to exercise no authority, except what is given by express terms or by necessary implication by that body. No vote or act of a corporation can enlarge its chartered authority, either as to the subjects on which it is intended to operate, or the persons or property of the corporators." Salem Milldam v. Ropes, 6 Pick. 23, 32. And the importance, for the security of the rights of each stockholder, of a steady adherence to the principle that "corporations can only exercise their powers over their respective members for the accomplishment of limited and well-defined objects," was strongly stated by Chief Justice Shaw in 1839. Spaulding v. Lowell, 23 Pick. 71, 75.

As was observed in Morville v. American Tract Society, 123 Mass. 129, 136, "The power to make all such contracts as are necessary and usual in the course of business, or are reasonably incident to the objects for which a private corporation is created, is always implied where there is no positive restriction in the charter." Thus a corporation may let or mortgage property lawfully held by it under its charter, and not immediately needed for its own business. Simpson v. Westminster Hotel Co., 8 H. L. Cas. 712; Brown v. Winnisimmet Co., 11 Allen, 326; Hendee v. Pinkerton, 14 Allen, 381. A corporation established "for the purpose of manufacturing and selling glass" may contract to purchase glassware from a like corporation to keep up its own stock and supply its customers while its works are being put in repair. Lyndeborough Glass Co. v. Massachusetts Glass Co., 111 Mass. 315. A corporation authorized to purchase and hold water power created by the erection of dams, and to hold real estate, may, when the water power has been lawfully extinguished, sell its lands, and as part of the contract of sale agree to raise their grade. Dupee v. Boston Water Power Co., 114 Mass. 37. A railroad corporation may agree to transport as a common carrier over connecting railroads goods intrusted to it for carriage over its own line. Hill Manufacturing Co. v. Boston, etc. Ry., 104 Mass. 122; Railway Co. v. McCarthy, 96 U. S. 258. And it can not dispute its liability for goods delivered to it to be carried over a railroad of which it is in actual possession and use under a lease, on the ground that the lease is void. McCluer v. Manchester, etc. Ry., 13 Gray, 124.

Several of the cases most relied on by the plaintiffs were not suits against a corporation to compel it to pay money for a purpose not within the scope of its charter, but suits by a corporation to recover money or property, which, when recovered, would be held for the lawful uses of the corporation. Chester Glass Co. v. Dewey, 16 Mass. 94; Old Colony Ry. v. Evans, 6 Gray, 25; National Pemberton Bank v. Porter, 125 M[illegible] 333; National Bank v. Matthews, 98 U. S. 62[illegible].

In Chester Glass Co. v. Dewey, the plaintiff, a corporation established for the purpose of manufacturing glass, kept a shop near its factory, for the accommodation of its workmen, containing a general assortment of such goods as are usually kept in country stores; and the defendant was a carpenter, living near, who made boxes and did other carpenter's work for the corporation. In an action for the price of goods sold and delivered to him from the shop, the defendant objected that the plaintiff was not authorized by law to keep such a shop and to sell goods in this manner; and it was held that this objection could not avail him. The leading reason assigned was, "The legislature did not intend to prohibit the supply of goods to those employed in the manufactory;" in other words, the contract sued on was not *ultra vires*. This reason being decisive of the case, the further suggestion in the opinion, "Besides, the defendant can not refuse payment on this ground; but the legislature may enforce the prohibition, by causing the charter to be revoked, when they shall determine that it has been abused," was, as has been since observed by the court, wholly *obiter dictum*. Whittenton Mills v. Upton, 10 Gray, 599.

In Old Colony Railroad v. Evans, the defendant, being under contract to haul a large quantity of gravel on to lands belonging to the city of Boston, made an agreement in writing with the plaintiff corporation, by which it agreed to purchase a tract of land in Quincy, and he agreed to take gravel therefrom, and to carry it in his own cars over the plaintiff's road to Boston, paying a specified toll; the defendant afterwards further agreed in writing that if the plaintiff would purchase another tract for the same purpose, he would pay the cost of the first tract; and both tracts were purchased by the plaiatiff. The objection that the corporation had no right to trade in gravel or land was raised by the defendant by way of defense to a bill in equity by the corporation for specific performance of his second agreement, by accepting a deed of and paying for the first tract. There can be no doubt of the correctness of the decision overruling the objection. The corporation, by its purchase, had acquired a title to the land, which was good against all the world, except, possibly, the Commonwealth; and the defendant, having knowledge of all the facts, did not and could not object that the title might be defeasible by the Commonwealth, Banks v. Poitiaux, 3 Rand. 136; Leazure v. Hillegas, 7 S. & R. 313; Goundie v. Northampton Water Co., 7 Pa. St. 233; Silver Lake Bank v. North, 4 Johns. Ch. 370, 383; Smith v. Sheeley, 12 Wall. 358; Commonwealth v. Wilder, 127 Mass. 1, 6. Although it was said in the opinion, that the purchase of the land seemed to have been made as a mode of promoting the purposes of the plaintiff's incorporation, the increasing of its business in transportation upon its railroad, and not as an object of trade or speculation in lands, the point adjudged was that the want of corporate capacity to purchase and sell lands was not a legal objection to the maintenance of the bill. The only authority referred to by the court was the treatise of Angell & Ames on Corporations, secs. 10, 11, 151, 153, of which the section most directly applicable is section 153, in which it is clearly laid down that a court of equity will enforce against a natural person his agreement to purchase of a corporation lands which it holds in violation of its charter, but will not enforce against a corporation its agreement to purchase lands for a purpose not authorized by its charter. The distinction is obvious. In the latter case, to enforce the agreement against the corporation is to compel the application of its funds to a purpose not authorized by law. In the former case, to compel the individual to take and pay for the property according to his agreement is the surest and most effectual means of replacing in the treasury of the corporation, for its lawful uses and the benefit of its stockholders, the funds which it had misapplied. Rutland, etc. R. Co. v. Proctor, 29 Vt. 93, 97.

In National Pemberton Bank v. Porter, the point decided was, that the objection that a National bank had exceeded its powers by purchasing a promissory note from an indorsee thereon did not prevent it from maintaining an action upon the note against the maker; for the reasons, that the action was not brought upon the contract of purchase, or against any party to that contract, and that it was not necessary in this Commonwealth that the plaintiff in an action on the promissory note should have any title or interest in it. See also Attleborough National Bank v. Rogers, 125 Mass. 339.

In National Bank v. Matthews, the act of Congress providing that a National bank might purchase and hold real estate for certain enumerated purposes only, of which to secure money lent at the time of taking a mortgage, was not one, was held by a majority of the court, in accordanee with the opinion of Chancellor Kent in Silver Lake Bank v. North, above cited, not to make void a mortgage given to secure the payment of a promissory note for money so lent, nor to prevent the bank from enforcing such a mortgage. A like decision was made in National Bank v. Whitney, 103 U. S. 99.

A corporation may, indeed, be bound to refund to a person, from whom it has received money or property for a purpose unauthorized by its charter, the value of that which it has actually received; for, in such a case, to maintain the action against the corporation is not to affirm, but to disaffirm the illegal contract. White v. Franklin Bank, 22 Pick. 181; Morville v. American Tract Society, 123 Mass. 129, 137; *In re* Cork, etc. Railway, L. R. 4 Ch. 748. But when the corporation has actually received nothing in money or property, it can not be held liable upon an agreement to share in, or to guaranty the profits of, an enterprise which is wholly without the scope of its corporate powers, upon the mere ground that con-

jectural or speculative benefits were believed by its officers to be likely to result from the making of the agreement, and that the other party has incurred expenses upon the faith of it. East Anglian Railways v. Eastern Counties Railway; Macgregor v. Dover & Deal Railway; Ashbury Railway Carriage & Iron Co. v. Riche, and Thomas v. Railway Co., above cited. Downing v. Mt. Washington Road Co., 40 N. H, 230; Franklin Co. v. Lewiston Institution for Savings, 68 Maine, 43.

The Old Colony Railroad Company is a railroad corporation, established by public statutes of the Commonwealth for the purpose of constructing and maintaining a railroad and carrying passengers and freight thereon. Sts. 1844, c. 150; 1854, c. 133; 1862, c. 149; 1872, c. 143. The holding of a "world's peace jubilee and international musical festival" is an enterprise wholly outside the objects for which a railroad corporation is established; and a contract to pay, or to guaranty the payment of, the expenses of such an enterprise, is neither a necessary nor an appropriate means of carrying on the business of the railroad corporation, is an application of its funds to an object unauthorized and impliedly prohibited by its charter, and is beyond its corporate powers. Such a contract can not be held to bind the corporation, by reason of the supposed benefit which it may derive from an increase of passengers over its road, upon any grounds that would not hold it equally bound by a contract to partake in or to guaranty the success of any enterprise that might attract population or travel to any city or town upon or near its line. It follows that in the first of the actions before us there must be judgment for the defendant.

The same reasons are no less applicable to manufacturing and trading corporations, established under general laws, and the purposes of which are required by those laws to be stated in their articles of association. The Smith American Organ Company was organized under the general act of 1870, c. 224, and the purposes of its incorporation are limited by its articles of association, as appearing in the certificate thereof, filed in the office of the Secretary of the Commonwealth, pursuant to that act, to "the manufacture and sale of reed organs and other musical instruments." The power to manufacture and sell goods of a particular description does not include the power to partake in, or to guaranty the profits of, an enterprise that may be expected to increase the use of or the demand for such goods. The case of Ashbury Railway Carriage & Iron Co. v. Riche, before cited, is directly in point.

This ground being decisive of the second action, it becomes unnecessary to consider the other objections to its maintenance, and the plaintiff's exceptions must be overruled.

NEGOTIABLE PAPER—PAYABLE TO FICTITIOUS PERSON—EFFECT.

KOHN v. WATKINS.

Supreme Court of Kansas.

1. Where a draft or bill of exchange is made payable to a real person, known at the time to exist and present to the mind of the drawer when he makes it; as the party to whose order it is to be paid, such draft or bill must bear the genuine indorsement of such payee, in order for a *bona fide* holder to recover thereon, although the bill is drawn without the knowledge or consent of the payee through the false representations of the party obtaining it from the drawer by fraud.

2. Where a drawer of a bill of exchange is induced by the false representations of a correspondent seeking to defraud him, to make a bill payable to a fictitious person, not knowing the payee to be fictitious when he makes the bill, and intending that such bill shall be payable to a real person, and thereafter transmits such bill to his correspondent with instructions to obtain a note and mortgage therefor from the payee therein named, and then to deliver over to such payee the bill, and the correspondent negotiates the bill to an innocent holder for value, and before dishonor, it will be no defense against such *bona fide* holder for the drawer to set up that he did not know the payee to be fictitious, and as such bill runs to a fictitious payee, it is as if drawn payable to bearer.

Error from Douglass County.

Messrs. Sluss & Hatton, for plaintiffs in error; *John Hutchins* and *R. J. Borgholthaus*, for defendant in error.

Action brought by Kohn Brothers & Co. against Watkins, upon the following drafts:

No. 6639. Office of J. B. Watkins & Co. } Lawrence, Ks., April 20, 1880. }

Pay to the order of Geo. W. Cobb, three hundred and fifty-five 00-00 dollars.

J. B. Watkins & Co.
Lawrence, Kansas.

$355. To Merchants' Bank.

(Indorsement on the back.) Pay to the order of R. G. Mc'Lain.

Geo. W. Cobb,
R. G. Mc'Lain.

No 6652. Office of J. B. Watkins & Co. } Lawrence, Ks., April 21, 1880. }

Pay to the order of Michael A. Becker, three hundred and fifty-five 00-100 dollars.

J. B. Watkins & Co.
Lawrence, Kansas.

$355. To Merchants' Bank.

(Indorsement on the back.) Pay to the order of R. G. Mc'Lain.

Michael A. Becker,
R. G. Mc'Lain.

No. 6656. Office of J. B. Watkins & Co. } Lawrence, Ks., April 21, 1880. }

Pay to the order of Henry Greer, four hundred and forty-four dollars. J. B. Watkins & Co.

Lawrence, Kansas.

$444. To Merchants' Bank.

(Indorsement on the back.) Pay to the order of R. G. Mc'Lain.

Henry Greer,
R. G. Mc'Lain.

Plaintiffs alleged in their petition that they are the *bona fide* holders and owners of said drafts; that they paid valuable consideration therefor, and that they are wholly unpaid. Trial had at the April term, 1881. A jury was waived, and the court made the following finding of facts:

"The plaintiffs are a banking firm doing businss at Wichita, Kansas, and were doing such business during all the times hereinafter mentioned. R. G. Mc'Lain was a real estate agent and solicitor of loans for parties desiring to borrow money upon real estate security, doing business at Kingman, in the State of Kansas, during all the times herein mentioned. He was well acquainted with the plaintiffs herein, and had done business with them at their bank at Wichita; and amongst other business had, prior to the transactions involved in this suit, negotiated and transferred to them two drafts drawn by the defendant upon the Merchants' Bank, and indorsed by said McLain, which drafts were paid by said bank on presentation. The defendant is, and during said periods of time has been, a resident of Lawrence, Douglass County, Kansas, and been engaged in the business of a solicitor of loans upon farm property. His manner of transacting business has been through two classes of correspondents, one of which furnished the money and received the securities which are through the other class of correspondents procured in various parts of the State, and composed of notes secured by mortgages upon the farm property of persons who desire to borrow money; as, for instance, a person at Abilene, desiring to borrow money, applies there to a loan solicitor, who examines his land, investigates the title, certifies to its value and the character and pecuniary responsibility of the applicant, and through the mail applies to the defendant for the loan. If the loan appears a desirable one, the defendant prepares the mortgage, etc., making it payable to some one of his first-mentioned correspondents, and transmits the same to the correspondent in this State who has sent the application, accompanied with a draft payable to the order of the mortgagor, with instructions to deliver the draft to such mortgagor on his delivering the mortgage duly executed and acknowledged, with the fees for recording paid, and also delivering the note of the applicant for the amount so secured by the said mortgage.

The correspondents of said Watkins furnishing applications for loans are paid by commissions allowed them by defendant upon the loans procured, which is sometimes included in the draft sent and obtained by the correspondent from the applicant for the loan, and sometimes paid by a separate draft to the correspondent.

Watkins receives his pay from commissions taken from the money secured by the loan. That on or about the 30th day of March, 1880, the said R. G. McLain transmitted to said defendant a fictitious application, purporting to be made by one Geo. W. Cobb, and asking for a loan of money upon premises therein described, situated in Kingman County, Kansas. The said fictitious application purported to be sworn to before said McClain, who was a notary public, and had his notarial seal affixed thereto, and the facts and statements contained purported to be verified by two witnesses, also purporting to be sworn to before said McLain; that said defendant accepted said application, believing it to be genuine, and in accordance with the practice before mentioned, transmitted to said McLain the unexecuted note and mortgage to secure a loan of $400, less commissions, together with the draft mentioned and described in plaintiff's petition herein, for $325, said draft to be delivered to said applicant upon the execution of said note and mortgage, and thereupon to become the property of said pretended Geo. W. Cobb; that no note or mortgage was ever executed by or in behalf of said Cobb; that said R. G. McLain indorsed upon said draft the name Geo. W. Cobb, and also his own name, and negotiated the same and received the money thereon from the plaintiffs in this action at the time and place in their petition mentioned; that at the same time with the aforesaid application of said pretended Cobb, said McLain forwarded to said defendant another fictitious application for a loan, purporting to be made and sworn to by one Henry Greer, and describing lands in Kingman County, and substantially in all respects like the application of said Cobb, but asking for a loan of $500, which application was accepted by defendant, and a blank note and mortgage, together with the draft set out in plaintiff's third stated cause of action, were forwarded to said McLain, as in case of said Cobb; that said McLain indorsed said draft with the name of said Greer, and with his own name, and negotiated the same and received the money thereon from plaintiffs at the time and place mentioned in their petition; that no such persons as Henry Greer or Geo. W. Cobb resided in Kingman County, or owned land therein as purported by said applications, but that said applications were wholly false and fraudulent, and manufactured by the said McLain with the design and for the purpose of obtaining money thereon fraudulently; that on March 30, 1880, said McLain transmitted to said Watkins, defendant, another fictitious application purporting to be made by Michael A. Becker, a former resident of said County of Kingman, but whose name was forged to said application to said McLain; that said application was, in form, substantially like the aforesaid applications of Greer and Cobb, and asked for a loan upon lands described in Kingman County, of $400; that defendant accepted said application believing it to be genuine, and undertook to loan upon the same the sum of $400, less commissions, and thereupon transmit-

ted to said McLain a blank note and mortgage, together with the draft mentioned in plaintiff's petition, and described in his second cause of action; that said McLain forged the name of said Becker as an indorsement upon the said draft, indorsed thereon his own name and thereupon negotiated the same and received from the plaintiffs the money thereon; that each and all of said drafts were received by the plaintiffs in the usual course of trade, and that they paid full value therefor; that said drafts were duly presented for payment, and payment thereon refused, of which the defendant had proper notice; that, prior to the presentation of said drafts for payment, defendant had discovered the fraud of said McLain and stopped payment of said drafts, and they were not paid by reason of defendant's order; that McLain was not the agent of defendant in said transactions; that defendant was not negligent in making and sending said several drafts to said McLain for the several persons who, by said fictitious applications, had applied for loans."

Thereon the court rendered judgment for defendant for all costs. Plaintiffs excepted and bring the case here.

HORTON, C. J., delivered the opinion of the court:

Upon the record of this case two different questions are presented for our decision. The first is, whether a draft or bill of exchange payable to a real person known at the time to exist, and present to the mind of the drawer when he made it, as the party to whose order it was to be paid, must bear the genuine indorsement of such payee in order for a *bona fide* indorsee to recover thereon, when such bill has been drawn without the knowledge or consent of the person named therein as a payee, through the false representations of a party forging the indorsement, who obtains it from the drawer by fraud and without consideration? Second. If a drawer be induced, by the fraudulent representations of a party seeking to defraud him, to make a draft or bill of exchange payable to a fictitious person, not knowing the payee to be fictitious when he makes the bill, and intending that such bill shall be payable to a real person, may the *bona fide* holder thereof recover upon it against a drawer as upon a bill payable to a fictitious payee? The first inquiry arises upon the finding of the trial court in relation to the bill payable to the order of Michael A. Becker. It appears that he was a former resident of Kingman County, and therefore a person *in esse;* that his name was forged to an application transmitted to Watkins by R. G. McLain, without the knowledge or consent of Becker, asking for a loan of money upon premises purporting to be situated in KingmanCounty. It further appeared that the defendant accepted the application transmitted by McLain, believing it to be genuine, and undertook to loan thereon the sum of $400, less commissions, and sent McLain a blank note and mortgage, together with the draft; that McLain forged the name of Becker upon the draft, indorsed thereon his own name, and negotiated the same, and received from the plaintiffs the money therefor. The plaintiffs received the draft in the usual course of trade, and paid full value. It is argued by counsel for plaintiffs that, as to this draft, Becker is to be deemed a fictitious person, because he had no knowledge of the draft, and no interest or concern in it. We do not think the position sound. The statute prescribes that, to make a bill of exchange drawn payable to order negotiable, it must contain the indorsement of the person therein named as the payee. Comp. Laws 1879, sec. 1, ch. 14, p. 127. And we suppose that counsel for defendant will concede, as a general rule, that the plaintiffs could not recover as the indorsees of the note without proving the indorsement of the payee. Now, while the authorities hold that when the drawer or maker of a bill of exchange knows that the payee is a fictitious person at the time he makes the draft, that a *bona fide* holder may recover on it against him as upon a bill payable to bearer; and, while some of the authorities hold that it will be no defense against a *bona fide* holder for the maker or drawer to set up that he did not know the payee to be fictitious, yet none of these authorities sustain the doctrine that if the payee be a real person, and such person was present to the mind of the maker or drawer when he made the draft as the party to whose order it was to be paid, a recovery can be had thereon without the genuine indorsement of the party who induced the drawer to make the bill by fraudulent representations, for the purpose of defrauding him in so doing. Nor can such bill be considered as one running to a fictitious payee, and as if drawn payable to bearer. If the principle contended for by counsel be adopted, it would be wholly immaterial whether the indorsement is genuine or not, so far as to give to the instrument the character of negotiable paper when the indorser himself is not actually sued. For it would always be open to the dilemma, if he is a party, it is a genuine indorsement; if he is not, he is a fictitious payee, and no indorsement is necessary. Dana v. Underwood, 19 Pick. 99; Rogers v. Ware, 2 Neb. 29. In our opinion the indorsement on the draft to Becker was a clear forgery, and the holders, however innocent, can not recover from the drawer.

The second inquiry presents more difficulty. No such persons as Henry Greer or Geo. W. Cobb, the payees mentioned in two of the drafts, resided in Kingman county, or owned land as purported by the applications transmitted by McLain to Watkins. These payees were fictitious. The finding upon this matter is that these applications (for loans) were wholly false and fraudulent, and manufactured by McLain with the design and for the purpose of obtaining money thereon fraudulently. In the draft to Becker, a real person was inserted as payee at the instance of McLain; but in the drafts to Greer and Cobb, fictitious names were transmitted by McLain, and such names adopted by the drawer from the applications so received by him from McLain, and these drafts, therefore,

were not payable to persons *in esse*. Although the defendant made the bills in ignorance of the fact that parties named as payees had no existence, yet, taking all the circumstances of the transaction together, we think the drafts to Greer and Cobb are controlled by the line of decisions respecting bills and notes made payable to a fictitious payee. Daniel on Negotiable Instruments, sec. 139, says: "In the case of a note payable to a fictitious person, it appears to be well settled that any *bona fide* holder may recover on it against the maker as upon a note payable to bearer. It will be no defense against such *bona fide* holder for the maker to set up that he did not know the payee to be fictitious. By making it payable to such person, he avers his existence, and he is estopped as against the holder ignorant of the contrary, to assert the fiction."

The authority to sustain the rule announced, is Lane v. Krekle, 22 Ia. 399. This authority, so far as the actual points necessary to have been decided in that case, hardly goes so far as the text of the author, because the note in that action was made payable to bearer; and Dillon, J., remarks at the commencement of the opinion: "That this fact relieves the case of some difficulties that would arise, were it payable to the person named, or order." Yet, that learned judge, in the opinion, presents a strong argument in favor of the proposition stated by Daniel. He says:

"Upon reason and principle we are clear that if the plaintiff is a *bona fide* holder for value, and without notice, the fact that a note is made payable to a fictitious person is no defense. In such case the defendant would be estopped as against the plaintiff from setting up the fact. It was the defendant who made the note. By making it payable as he did, he affirmed the existence of such a person as the payee therein named, and he should not, against a person ignorant of that fact — one who may be reasonably presumed to have acted upon the faith of the fact thus represented — be allowed to assert the contrary. This principle of estoppel *in pais* has a very extended and just application in the law of bills and notes, the doctrines of which are designed to give credit and circulation to negotiable paper, and to that end throw its protection around the honest and fair holders thereof. In respect to such a holder, the maker is bound to know that the payee is a real person, or thereafter hold his peace."

In the case of Phillips v. Imthurn, 114 Eng. C. L. 694, the defense was that the payee was a fictitious person, in ignorance of which fact the drawer drew the bill. It was decided by the court that since the drawer would be estopped to set up the fact that the payee was a fictitious name, the like estoppel would apply to an acceptor for the honor of the bill. In Forbes v. Espey, 21 Ohio St. 474, the defendants drew upon their correspondents in New York City in favor of Cochran, Holmes & Co., and by them indorsed the bill to Charles Clark, a fictitious name assumed by one William Mara, and in that name indorsed in blank. Forbes & King became the *bona fide* holders of the draft. It was presented, payment refused by previous directions of the defendants, protested, and due notice given to the defendants. Mr. Justice McIlvaine, speaking for the court, says, that the defendants were estopped from denying plaintiff's title. In Chalmer's Bills of Exchange, p. 144, the law is thus stated: "B, at the request of X, makes a note payable to C's order; C is a fictitious person, but B does not know this. X indorses the note in C's name, and it is negotiated to D. a *bona fide* holder for value, without notice. D can sue B." *Cf.* Cooper v. Mayer (1830) 10 B. & C. 458: Beeman v. Duck (1843), 11 M. & W, 251; Schultz v. Astley (1836), 2 Bing. (N. C.) 544.

Passing from these cases, and the authorities therein cited, to the reasons for these two drafts being held as payable to fictitious payees, we add, that, of course, if Watkins had not intended that such payees should become parties to the transaction, or, in other words, had knowledge of their non-existence, there could be no question of error in the judgment of the court below. 1 Parsons on Bills, 32, 560, 591, 592, and notes; 2 Parsons on Bills, 48-50; Story on Bills, secs. 56-200; 4 E. D. Smith, 33. Ought the defendant who made the bills in ignorance of the fact that the persons named as payees were fictitious, and thus parted with them to a correspondent, be permitted to aver and prove this as against the innocent holders for value? Either plaintiffs or defendants must lose in this transaction. Watkins transmitted these drafts to his correspondent McLain, and McLain was thereby enabled to fraudulently put them in circulation. If the payees had been known to defendant as fictitious, they could have been treated by McLain, as well as the plaintiffs, as bills payable to bearer. Now, when a drawer issues a bill to a fictitious payee, although ignorant of that fact at the time, and parts with the possession thereof, ought he in fairness and justice be allowed to say that such bill is void? Where one of two innocent parties must suffer from the wrongful or tortuous acts of a third party, the law casts the burden of loss upon him by whose act, omission or negligence, such third party was enabled to commit the wrong which occasioned the loss. Bank v. R. Co., 20 Kas. 519. While the finding is that the defendant was not negligent in making and sending these drafts, and that McLain was not the agent of the defendant in these transactions, it fully appears from the other findings that the drafts were sent to McLain, and that only for the act and conduct of the defendant, induced by the wrongful acts of McLain, these bills would not have been issued and sent forth as commercial paper. To some extent, it must be conceded, defendant by his conduct as to these bills, placed himself in the hands of his correspondent. For instance, if Greer and Cobb had been in existence, and McLain had passed over to them these drafts without taking back any notes or mortgages, it will not be questioned that

after Greer and Cobb had indorsed and negotiated them to innocent holders, the defendant could not set up the fraud of these parties as any defense. In this way, if such parties were insolvent, the defendant would have been absolutely defrauded of his money. So we think that, having relied upon the applications received from McLain for the names of the payees in the drafts issued by him, and two of the payees being fictitious, and then having transmitted these drafts to McLain, and thus give him the opportuuity to put them in circulation, the defendant is not now in a condition to claim the drafts were void, and to set up as a defense that he did not know such payees to be fictitious. He acted upon the information derived from McLain; he is bound by McLain's knowledge, and must be conclusively presumed as against the innocent holders for value to have known these two drafts were payable to fictitious payees. He can no more set up the fraud of McLain as to these two drafts, than he could the fraud of Greer and Cobb, had there been such persons actually existing in Kingman county, and they had obtained these drafts from McLain without complying with the request of the drawer as to the execution of the notes and mortgages, and then indorsed and negotiated them to innocent holders. Counsel for defendant refer to cases making the indorsement by McLain upon the bills, at the time he delivered them to plaintiffs, a forgery. Even if this be so, we do not think it prevents the recovery by plaintiffs, because the principle of estoppel *in pais* is to be applied to the defendant, and as between the plaintiff and defendant these drafts are to be treated as drawn payable to bearer. The case will be remanded, with directions for the court below to render judgment upon the findings of facts for plaintiffs, upon the drafts payable to Greer and Cobb, and judgment for the defendant upon the draft payable to Becker.

All the justices concurring.

WEEKLY DIGEST OF RECENT CASES.

DAMAGES—PROSECUTION OF CIVIL SUIT.

It is not actionable to assert an unfounded claim by suit at law for damages committed by an alleged tort to property. A failure to maintain it by proof entitles the defendant to his costs, and no more. *Moore v. Long*, Commr. of App., S. C. Tex., Dec. 7, 1881.

EVIDENCE—ADMISSION IN LEASE.

Action of trespass upon real estate. Plaintiff introduced, as bearing upon the value of the use of the premises, an indenture of lease executed by plaintiff and defendant, by which defendant had agreed to pay plaintiff the sum of $700 per annum for a like use of the same premises for a term immediately preceding the alleged trespass. In rebuttal, defendant offered to prove that it executed the lease when an injunction against the boom company, in behalf of plaintiff, was pending, and that the company had no alternative than to accept plaintiff's terms, or turn its logs over the falls of St. Anthony and lose them. Upon plaintiff's objection this evidence was excluded, and defendant excepted. *Held*, error. *Weaver v. Mississippi, etc. Boom Co.*, S. C. Minn., Dec., 1881.

HOMESTEAD—ABANDONMENT—WHAT AMOUNTS TO.

Where the owner of a homestead has permanently and unequivocally abandoned it, by remaining from it, and acquiring a new homestead elsewhere, his right of exemption to the first is lost. This is not such a removal as is contemplated or permitted by sec. 8, c. 68, Gen. St. 1878. Hence, filing notice of claim under sec. 9, c. 68, Gen. St. 1878, under such circumstances, will not preserve or continue his right of exemption. *Donaldson v. Lamprey*, S. C. Minn., Dec. 30, 1881.

JUDGMENT—VOID AND VOIDABLE.

It is a well established proposition of law that a judgment of a court of competent jurisdiction, which is irregular and voidable but not void, can not be attacked in a collateral proceeding. *Henzje v. Ward*, Comr. of App., S. C. Tex., Dec. 14, 1881.

JURY—TAMPERING WITH THE JURY.

A communication by the successful party to the jurors pending the trial, if casually made, without any intent to influence the verdict, and if the court can clearly see that it could not have had any effect on the minds of the jurors, is not ground for a new trial. *Oswald v. Minneapolis, etc. R. Co.*, S. C. Minn., Dec. 28, 1881.

MALICIOUS PROSECUTION—PROBABLE CAUSE—EVIDENCE.

In an action against the mayor of a city and his officers for false imprisonment, the evidence on the part of the defendants showing their good faith and the existence of probable cause, need not be very strong to shift the burden upon the plaintiff to establish want of reasonable cause and malice. *McArthy v. DeArmit*, S. C. Pa.

MASTER AND SERVANT—CONTRACT—EMPLOYMENT—TERM.

Where one rendering service for another under a monthly employment, says to his employer that he desires to have his employment made more permanent, and thereupon a specified amount per year is agreed upon, payable in semi-monthly instalments, a hiring for a year may be inferred. Express words that the employment should continue for a year are not essential. *Bascom v. Shillito*, S. C. Ohio, Jan. 10, 1882.

NEGLIGENCE—RAILWAY FIRES—SUFFICIENCY OF EVIDENCE.

1. The evidence tended to show that the fire started in the grass near and to the leeward of defendant's track a few minutes after a train had passed; that there was quite a stiff breeze; that there was no person, and no other fire than that of the passing engine, in the vicinity at the time. *Held*, to justify a finding of the jury that it was fired by the engine. 2. The failure to plow around stacks not negligence *per se*. *Karson v. Milwaukee, etc. R. Co.*, S. C. Minn., Dec. 30, 1881.

PARTITION—MORTGAGE—TENANCY IN COMMON.

A judgment or a mortgage, or a lien against one tenant in common, does not prevent a partition, either at his instance or at that of another of the tenants. *McCandless v. Mackey*, S. C. Pa.